Filed 2/11/09 In re J.H. CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re J.H., et al., Persons Coming Under the Juvenile Court Law.	B209049 (Los Angeles County Super. Ct. No. CK 68293)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. RUBY T., Defendant and Appellant.	

APPEAL from an Order of the Superior Court of Los Angeles County. Steven L. Berman, Referee. Affirmed.

Amy Z. Tobin, under appointment by the Court of Appeal for Appellant Ruby T.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, Ligia G. Schaffer, Senior Deputy County Counsel, for Respondent Los Angeles County Department of Children and Family Services.

Mother Ruby T. appeals the dependency court orders summarily denying her two Welfare and Institutions Code section 388[1] petitions seeking return of her son M.O. to her mother's custody. Mother contends she made a prima facie case of changed circumstances sufficient to trigger her right to a hearing. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

1. Prior Appeal.

Ruby T. is the mother of two girls, V.S. (born 1993) and J.H. (born 1996), and a boy, M.O. (born 2004). On April 27, 2007, the Department received a referral alleging that Mother physically and emotionally abused J.H.

On May 1, 2007, the Department interviewed the children's maternal grandmother, who told the social worker she was concerned about Mother's treatment of the children. At the time, Mother, J.H. and M.O. had been living with Mother's mother for two weeks. V.S. had been residing with her grandmother since birth because Mother had left her with the grandmother when she was a week old; the grandmother was V.S.'s legal guardian.

The grandmother told the social worker that Mother had been irresponsible all of her adult life, was unable to maintain a job, and moved every one to two months because she failed to pay her rent. J.H. told the social worker she was afraid of Mother, and that Mother yelled at her on a regular basis. Mother used profanity and hit J.H. with a shoe on her back, arms, legs, and buttocks. J.H. explained that Mother became angry when J.H. did not take care of her brother M.O. when Mother was watching television or talking on her cell phone. J.H. stated that her grandmother intervened when Mother mistreated her, and that she felt safe with her grandmother.

The Department concluded that the children's safety was an immediate concern. Mother had failed to sustain a permanent, stable home for the children, and moved from home to home, disrupting J.H.'s school attendance; Mother had been dishonest about her

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[1] All statutory references herein, unless otherwise noted, are to the Welfare and Institutions Code.

mental health history and substance abuse; Mother lacked insight into her own behavior and lack of responsibility; and she displayed a pattern of abandoning her children.

A section 300 petition filed May 29, 2007, alleged that Mother physically and emotionally abused the children. (§ 300, subds. (a), (b), (c) and (j).) The Department's detention report recommended that the children remain placed with their grandmother. At the May 29, 2007 detention hearing, the court ordered the children detained. The court ordered Mother to take domestic violence classes (a 52-week batterer's program), parenting, counseling (addressing all case issues), random drug and alcohol testing, and alcohol rehabilitation. The court ordered individual counseling for J.H.

The Department's jurisdictional and disposition report stated that the children remained with their grandmother. Mother had been visiting the children once a week. She was sharing an apartment with a friend and was employed at Ross. Mother denied using drugs. Mother told the social worker she had married M.O.'s father Juan[2] in 2002, but they had separated in December 2006. Juan, who was living in Mexico, was employed in the produce business, and wanted his son to reside with him in Mexico.

Following mediation, at the continued August 20, 2007 jurisdictional and disposition hearing, Mother submitted to an amended petition, and agreed to parenting education, alcohol and drug abuse counseling, monitored visitation, and counseling for J.H. The court ordered Mother into a drug and alcohol program, weekly testing, rehabilitation, parenting education, joint counseling with J.H., and counseling to address case issues including a psychiatric evaluation. The court noted that mother had finished her 12-week parenting classes, and ordered the Department to determine the appropriateness of placing M .O. with his father Juan.

The status review report for the February 15, 2008 six-month review hearing stated that J.H. and M.O. remained placed with their grandmother. J.H. told the social worker she did not want to be returned to Mother, nor did she want unmonitored visitation with Mother.

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[2] The court found Juan Manuel O. to be the presumed father of M.O. It also found Lorenzo H. to be the presumed father of V.S. and J.H. Lorenzo H. did not participate in the dependency proceedings.

Mother had recently enrolled in a counseling program, and showed a "high interest" in reunifying with her children. However, Mother was guarded about her mental health issues, and denied that she had problems. Although the home study on M.O.'s father had been completed, the Department did not recommend that M.O. be placed with him at this point because Mother had shown progress in complying with her treatment plan.

The report noted that in August 2007, Mother had enrolled in a six-month substance abuse program, and was testing weekly. She had submitted 21 negative tests, but had failed to test on three occasions. Mother had enrolled in individual counseling on February 7, 2008, and a psychiatric evaluation of Mother disclosed that Mother was "within normal limits;" she had not been prescribed any medication. However, the report noted that Mother might suffer from a mood disorder or bipolar disorder. Mother visited with J.H. and M.O. twice weekly at their grandmother's home, and based on her progress, Mother's visits had been liberalized from monitored to unmonitored in placement only. Nonetheless, J.H. told the social worker she did not want unmonitored visits with Mother, and that she feared Mother would abscond with M.O. Mother's interaction with the children at the visits was poor. The Department reported that Mother was making progress in complying with her case plan, and "[o]verall the mother is working toward meeting her treatment goals and overcoming past issues that initially led the family to have DCFS intervention."

At the February 15, 2008 hearing, the court stated it was considering placing M.O. with his father. Mother informed the court she was making progress in her programs, and had completed her parenting class, six sessions of individual counseling, 60 sessions of AA, and had been visiting the children. The court found Mother in partial compliance, noting that she needed four or five more months of reunification services; it ordered her to continue testing and continue her domestic violence and anger management courses. The court ordered M.O. released to his father's custody, and set a review hearing for May 27, 2008.

On February 18, 2008, Juan O. informed the Department he would take custody of M.O., pending issuance of a passport for M.O. so that they could return to Mexico.
On March 11, 2008, Mother filed a section 388 petition seeking return of M.O. and J.H., alleging she had complied with her case plan. Mother further alleged that the children

would benefit by being returned to her because the children had a close bond and should be considered a sibling group. She alleged that if M.O. were returned to Mexico, the siblings would be separated; furthermore, M.O. had a closer relationship with Mother than he did with his father. The dependency court summarily denied the petition on the grounds it did not state any new evidence or changed circumstances since the last hearing on February 15, 2008, and Mother had just started an anger management program.

On March 21, 2008, Mother filed another section 388 petition seeking return of J.H. and M.O., alleging that M.O. would be emotionally hurt by a return to Mexico; she was willing to support her children; and she was working, could provide a stable home, and was attending church every Sunday. The dependency court summarily denied the petition because it did not state facts supporting the request, and the request did not set forth new evidence or changed circumstances.

On November 12, 2008, we affirmed both orders.

2. *Current Appeal.*

The Department's report prepared for the May 21, 2008 hearings (a section 364 with respect to M.O., and the 12-month review hearing with respect to J.H.) stated that as of the writing of the report, the Department had not yet placed M.O. with Juan, despite the court's order of February 28, 2008 because Mother's mother had been unable to get M.O.'s birth certificate certified to facilitate his transfer to Juan in Mexico. M.O. and J.H. continued to reside with their grandmother, with whom they had a good relationship. M.O. was developing at an age-appropriate level and attending pre-school. Mother continued to test negative for drug use,[3] and had been psychiatrically evaluated three times and found to be "within normal limits" each time. Mother had stopped attending individual counseling, but had been making good progress at Shiloh participating in anger management and victims of domestic violence counseling. Mother continued to have twice weekly visits of two to three hours each with the children at the grandmother's home. However, the quality of the visits was not good as Mother did not interact with the children appropriately.

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[3] Mother had one test indicating the presence of morphine and opiates, and contended it was likely from taking Tylenol with Codeine for pain.

At the hearing, the dependency court noted that Juan had not been able to obtain M.O.'s passport. Further, there appeared to be issues with Mother's counseling. She had been seeing a pastor at Shiloh, which the Department had not approved. Although the court had ordered conjoint counseling with J.H. in August 2007, the minor had to date refused to participate in such counseling. The court ordered conjoint counseling to begin forthwith, and found Mother in partial compliance with her case plan. The court set a section 366.22 hearing for November 19, 2008, and continued the section 364 hearing on M.O. until June 12, 2008.

On May 27, 2008, Mother filed a section 388 petition seeking return of M.O. to her mother's custody on the grounds that M.O. would have better educational opportunities in the United States. The dependency court summarily denied the petition because the petition did not state changed circumstances, and Juan was non-offending and wanted custody.

On June 3, 2008, Mother filed a second section 388 petition, seeking to return M.O. to Grandmother's custody, alleging that moving M.O. to a "third-world country where poverty, disease and crime are rampant, is not in the minor's best interest[s]. The father has a history of violence and alcoholism, which puts the minor at risk for abuse and bad examples. The mother is better prepared to raise the minor because of her completing/ongoing classes and counseling." The petition attached a declaration from James P. Seagall-Gutierrez, Mother's attorney, stating that Juan had a 2004 arrest for corporal injury and battery on a spouse because he had kicked Mother, and personal acquaintances of Juan had told Seagall-Gutierrez that Juan was an alcoholic and abusive. On the other hand, Mother had been working on her court-ordered programs, attending anger management and individual counseling, and had completed her substance abuse and parenting programs. Juanita Aburto submitted a declaration that stated she had seen Juan use a powdery substance and drink heavily, but she had not seen Juan in several years.

The court summarily denied the petition because it did not state new or changed circumstances.[4]

DISCUSSION

Mother contends the dependency court erred in summarily denying her two section 388 petitions because she made a prima facie showing of changed circumstances and that it was in M.O.'s best interests to change the custody order. We disagree.

Section 388, subdivision (a), permits a party to petition the juvenile court for a hearing to change, modify or set aside a previous order on the ground of changed circumstances or new evidence. If the petition shows changed circumstances or new evidence indicating that the proposed modification may be in the child's best interests, the juvenile court must hold a hearing within 30 days. (§ 388, subd. (c); Cal. Rules of Court, rule 5.570(f).) If, however, the petition fails to "make a prima facie showing (1) of a change of circumstances or new evidence requiring a changed order, and (2) the requested change would promote the best interests of the child[,]" the juvenile court may deny the petition summarily, without a hearing or notice to the other parties. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 188-189; see also Cal. Rules of Court, rule 5.570(d).)

Section 388 petitions "are to be liberally construed in favor of granting a hearing to consider the parent's request. [Citations.] The parent need only make a prima facie showing to trigger the right to proceed by way of a full hearing." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309-310.) "'[I]f the petition presents any evidence that a hearing would promote the best interests of the child, the court will order the hearing.' [Citation.]" (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415.) Nevertheless, "[t]he petition may not be conclusory. 'Specific allegations describing the evidence constituting the proffered changed circumstances or new evidence' is required. [Citation.] Successful petitions have included

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[4] Subsequent to the denial of Mother's section 388 petitions, the Department's report prepared for the June 12, 2008 interim review hearing stated that Juan had obtained M.O.'s passport, but needed to wait to travel to Mexico until the grandmother could take M.O. on June 27, 2008. The court continued M.O.'s section 364 hearing to July 18, 2008.

declarations or other attachments which demonstrate the showing the petitioner will make at a hearing of the change in circumstances or new evidence." (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.) In determining whether to grant a hearing, the juvenile court is not limited to considering the facts averred in the petition. Rather, the juvenile court "may consider the entire factual and procedural history of the case. [Citation.]" (*In re Justice P., supra*, 123 Cal.App.4th at p. 189.) We review the dependency court's denial of a hearing on the section 388 petition for abuse of discretion. (*In re Shirley K.* (2006) 140 Cal.App.4th 65, 71.)

The court did not abuse its discretion in summarily denying Mother's petition. As to changed circumstances, Mother failed to present new evidence sufficient to warrant a hearing. Mother's own circumstances had changed little since the February 2008 hearings; although her drug tests were clean and she had enrolled in anger management, she had yet to comply with her case plan. She had terminated individual counseling and her interaction with the children during visitation was poor. As to the best interests showing, nothing in Mother's petition undermines the findings the court made at the February 15, 2008 hearing that placement with Juan, whom the court found to be non-offending, would be appropriate.[5] On that basis, we find no abuse of discretion.

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[5] Mother contends the dependency court in February 2008 failed to consider section 361.2, subdivision (a) in awarding custody to Juan and making a finding of no detriment to M.O. This argument is waived due to Mother's failure to timely appeal. (Cal. Rules of Court, rule 8.400, subd. (d) [60-day period to appeal dependency court orders; *In re Jesse W.* (2001) 93 Cal.App.4th 349, 355 [an unappealed disposition or postdisposition order is final and binding and may not be attacked on an appeal from a later appealable order].) Here, the court entered its February 15, 2008 order giving custody of M.O. on February 28, 2008. Mother did not appeal that decision, and her June 12, 2008 appeal from her May and June 2008 section 388 petitions are untimely with respect to the court's February 2008 order.

DISPOSITION

The orders of the superior court are affirmed.

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ZELON, J.

We concur:

WOODS, Acting P. J.

JACKSON, J.